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Litigation and Reform

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More than 1.6 million lawsuits enforcing federal laws were filed over the past decade, about 97 percent of which were litigated by private parties. The suits spanned the waterfront of federal regulation, covering the policy domains of antitrust, civil rights, consumer protection, environmental law, labor, and securities and exchange. While the United States had long relied upon private litigation to enforce federal statutes, its frequency of doing so exploded in the late 1960s. From a rate of 3 per 100,000 population in 1967—a rate that had been roughly stable for a quarter century—it climbed to 13 by 1976, to 21 by 1986, to 29 in 1996, increasing by about 1000% during these three decades. Beginning around the end of 1960s, there was an utterly unmistakable explosion of private lawsuits filed to enforce federal statutes.

By the 1980s, calls emerged in Washington for “litigation reform” in the federal system, seeking changes in federal law calculated to *reduce* incentives for lawsuits. I call this “anti-litigation reform.” By the 1990s, conflict over litigation reform intensified, with Republican’s predominantly arguing for anti-litigation reform and Democrats predominantly opposing them. Reduction of “frivolous” lawsuits in federal court became the central call of the anti-litigation reformers. Currently pending before Congress is the Republican-sponsored Lawsuit Abuse Reduction Act of 2011, with the goal of reducing frivolous lawsuits in federal court by increasing sanctions against those who file them. Anti-litigation reform bills have become routine in Congress, and partisan battles over the role litigation in federal regulation have become a regular part of national regulatory politics.

Contemporary tropes of anti-litigation reform often stress overclaiming by irresponsible and gold digging plaintiffs, represented by greedy and unethical lawyers. In contrast, this paper argues that the origins and meaning of partisan conflicts over litigation reform in the federal system are rooted in the emergence and success of an earlier litigation reform movement, one

which was part of the broader movement to reform the regulatory state in the late 1960s and early 1970s. At that time, litigation reform—though it was not called that—had the opposite ambition of today’s litigation reform. Its goal was to *increase* lawsuits to compensate for perceived failures in bureaucracy, pursuing private enforcement as an alternative. This regulatory reform strategy succeeded in laying the foundation for the country’s current massive reliance upon private lawsuits in federal regulation. I refer to this as the “pro-litigation reform” movement.

This chapter examines struggles over litigation reform in federal regulation during roughly the two decades from passage of the Civil Rights Act of 1964 to the end Reagan’s first term. It first traces the historical and political factors that led liberal advocates of the new social regulation to grow increasingly skeptical of the administrative state as an effective enforcer, and to turn instead to a strategy of creating market incentives for private lawsuits for enforcement, a model of privatization learned from the experience of civil rights. This chapter shows how the contemporary anti-litigation reform movement emerged in the early Reagan years as a challenge to the successes of the pro-litigation reform movement over the previous decade, and as one component of the administration’s broader deregulatory program. Finally, it assesses why Reagan’s anti-litigation reforms failed, highlighting political and institutional sources of the resilience of America’s private enforcement infrastructure.

Liberal’s waning faith in administrative power in the late 1960s

During the New Deal it had been liberals who were the chief architects of the administrative state-building project, while its principal detractors were business interests and their allies in the Republican party. Within the sphere of regulation, liberals’ state-building vision and ambition was one of regulation through expert, centralized, federal bureaucracy.

According to James Q. Wilson, “The New Deal bureaucrats” piloting a centralized federal bureaucracy “were expected by liberals to be free to chart a radically new program and to be competent to direct its implementation.”¹ By the late 1960s, however, there was mounting disillusionment on the left with the capacities and promise of the American administrative state. As Wilson put it in 1967, “Conservatives once feared that a powerful bureaucracy would work a social revolution. The left now fears that this same bureaucracy is working a conservative reaction.”²

The metamorphosis toward liberal disillusionment with the administrative state coincided with, and was propelled by, the proliferation starting in the mid to late 1960s in the number, membership, and activism of liberal “public interest” groups.³ A primary focus of these groups was on regulation, mainly of business, in such fields as environmental and consumer protection, civil and worker rights, public health and safety, and other elements of the “new social regulation” of the period. The political significance of liberal public interest groups to the story of litigation reform is importantly connected to their position within the Democratic party coalition.

The Democratic-Liberal Public Interest Coalition

After about 1968, owing both to liberal public interest groups’ increasingly assertive role in American politics, and to reforms within the Democratic party organization, such groups emerged as an important and core element of the Democratic party coalition, a position they continue to occupy to the current day.⁴ David Vogel shows that within the Democratic party coalition, “During the 1970s, the public-interest movement replaced organized labor as the central countervailing force to the power and values of American business.”⁵ The affinity between the Democratic party and liberal public interest groups is hardly surprising. In the 20th

century, a bedrock axis distinguishing the Democratic and Republican parties is Democrats' greater support for an interventionist state in the sphere of social and economic regulation, much of which targets private business.⁶ An activist state, particularly one prepared to regulate private business, is exactly what the agenda of liberal public interest groups called for, from non-discrimination on the bases of race, gender, age, and disability; to workplace and product safety; to cleaner air and water; to truth-in-lending and transparent product labeling. As between the two major political parties in the U.S., the Democrats were their party.

Reasons for the liberal loss of faith in bureaucracy

Capture and timidity

What explains the liberal loss of faith in bureaucracy among public interest groups and their allies among the Democratic party? A number of charges were leveled. Because regulatory agencies interacted with regulated industries on an ongoing basis, agencies had been “captured” by business—regulators had come to identify with regulated business, treating them as the constituency to be protected. Alongside regulated business's extensive access to and influence upon bureaucracy, liberal public interest groups believed that they were, by comparison, excluded, disregarded, and ignored by administrative policymakers. Moreover, bureaucrats were by nature timid and establishment oriented, wishing to avoid controversy and steer clear of the political and economic costs associated with serious conflict with regulated business. On balance, this added up to an implementation posture hardly likely to secure the transformative goals of the liberal coalition.⁷

Democratic Legislators, Republican Presidents, and Party Polarization

As the liberal coalition's growing concern about the limits of bureaucratic regulation was gathering strength in the late 1960s, an important transformation in the alignment of American

government profoundly deepened their skepticism toward the administrative state as a regulator. The new dominant governing alignment in the U.S. combined divided government and party polarization, primarily with the Democrats writing laws in Congress, and Republican presidents exercising important influence on the bureaucracy charged with implementing them. In the first sixty-eight years of the twentieth century, the parties divided control of the legislative and executive branches 21 percent of the time, and in the subsequent thirty-two years of it (from Nixon through Bush II), the figure was 81 percent. The durability of the condition of divided government that emerged in the late 1960s was exacerbated by another factor contributing to legislative-executive antagonism. Starting around the early 1970s, the growth of ideological polarization between the parties, which increased through century's end, eroded the bipartisan center in Congress and fueled the antagonisms inherent in divided government.⁸

Add to this that during the years of divided government between Nixon taking office and the end of the twentieth century, 77 percent of the time Democrats controlled one or both chambers of Congress while a Republican occupied the presidency. Congress—the legislation-writing branch of government—was predominantly controlled by the Democratic party, with its stronger propensity to undertake social and economic regulation, and with liberal public interest groups occupying an important position within the party coalition. This legislative coalition largely faced an executive branch in the hands of a Republican president, the leader of a political party more likely to resist and oppose social and economic regulation.

This new alignment in American government was unlikely to make anyone happy. Not surprisingly, periods of Democratic Congresses facing Republican presidents were characterized by virtually continuous acrimonious conflict between the liberal coalition in Congress and the comparatively conservative Republican leadership of the federal bureaucracy. Liberal public

interest groups and congressional Democrats regularly attacked the federal bureaucracy under Republican leadership, claiming that it was *willfully* failing to effectuate Congress's legislative will. They charged that the executive branch adopted weak, pro-business regulatory standards; devoted insufficient resources to regulatory implementation; generally assumed a posture of feeble enforcement, and at times one of abject non-enforcement. Such charges ranged across many policy domains, including civil rights, environmental, and consumer regulation.⁹ The convergence of divided government, party polarization, and Democratic legislatures facing Republican presidents, sent the liberal legislative coalition in search of new strategies of regulation.

Private lawsuits as a regulatory reform strategy

The liberal coalition pursued a number of reform strategies to address the problems underpinning its disillusionment with the administrative state, its growing anxiety about presidential ideological influence upon bureaucracy, and its concern about non-enforcement of congressional mandates. One set of strategies employed sought more effective control of the bureaucracy by the liberal coalition. It advocated enlarging opportunities for effective participation in the administrative processes—particularly rulemaking—by public interest groups and their allies. It sought to force agency actions through legislative deadlines and other means when agencies failed to carry out mandatorily prescribed responsibilities. It pressed for more aggressive congressional oversight and more frequent and stringent judicial review of important agency decisions. These were all strategies of reform through enhanced influence upon and control over the bureaucracy, and they have been widely examined by scholars.¹⁰

An additional response, which has been less studied and is the primary focus of this chapter, was to advocate statutory rules that allowed circumventing the administrative state

altogether by undertaking *direct* enforcement of legislative mandates through private lawsuits against the targets of regulation, such as discriminating employers, polluting factories, and deceptive labelers of consumer products.¹¹ It is important to differentiate clearly between judicial review of agency action (one of the strategies discussed in the last paragraph), and direct private enforcement lawsuits. Rather than seeking to shape and constrain the behavior of bureaucracy, the direct enforcement strategy instead privatizes the enforcement function. When Congress elects to rely upon private litigation by including a private right of action in a statute, it faces a series of additional choices of statutory design—such as who has standing to sue, how to allocate responsibility for attorney’s fees, and the nature and magnitude of damages that will be available to winning plaintiffs—that together can have profound consequences for how much or little private enforcement litigation will actually be mobilized.¹² This paper refers to this constellation of rules as a statute’s “private enforcement regime.”

Among incentives to encourage private enforcement of regulatory laws, statutory fee shifting rules allowing plaintiffs to recover attorney’s fees if they prevail are especially important.¹³ Under the “American rule” on attorney’s fees, which generally controls in the absence of a statutory fee shift, each side pays their own attorney’s fees regardless of who wins. In light of the high costs of federal litigation, winning plaintiffs would often suffer a financial loss under the American rule, resulting in a disincentive for enforcement. By the early 1970s, liberal regulatory reformers were urging Congress, in order to mobilize private enforcement, to include private rights of action coupled with fee shifting provisions in the new social regulatory statutes, across the fields of civil rights, environmental, consumer, labor, and public health and safety, among others.¹⁴ Monetary damages enhancements—which allow a plaintiff to recover more than the economic injury suffered, such as double, triple, or punitive damages—can also

serve to incentivize enforcement.¹⁵ This strategy was aimed to facilitate impact litigation by law reform organizations, and, critically, to cultivate a for-profit bar to achieve day-to-day enforcement of ordinary claims—a function vastly beyond the capacity of small non-profit groups. The strategy did not arise from abstract reflection. Rather, it was learned from unexpected developments in the area of civil rights.

The emergence and spread of the litigation solution in the 1970s

The civil rights model

Civil rights groups' embrace of private lawsuits for implementation has ironic origins in the job discrimination title of the foundational Civil Rights Act of 1964. When that law was proposed and debated in 1963-64, liberal civil rights advocates wanted a job discrimination enforcement regime centered on New Deal-style administrative adjudicatory powers modeled on the National Labor Relations Board, with Equal Employment Opportunity Commission authority to adjudicate and issue cease-and-desist orders, *with no private lawsuits*. This preference was reflected in the job discrimination bill initially introduced by liberal Democrats with support from civil rights groups. At the time, the Democratic party, while a majority in Congress, was sharply divided over civil rights, with its southern wing deeply committed to killing any job discrimination (or other civil rights) bill. In light of these insurmountable intraparty divisions, passage of the CRA of 1964 depended on conservative anti-regulation Republicans joining non-southern Democrats in support of the bill.¹⁶

Wielding the powers of a pivotal voting bloc, conservative Republicans stripped the EEOC of the strong administrative powers initially proposed by civil rights liberals, and provided instead for private lawsuits for enforcement. Generally opposed to bureaucratic regulation of business, conservative Republicans also feared that they would not be able to

control an NLRB-style civil rights agency in the hands of their ideological adversaries in the executive branch, long dominated by Democrats, and which passed from the Kennedy to the Johnson administrations while the bill proceeded through the legislative process. At the same time, in a political environment marked by intense public demand for significant civil rights legislation, some meaningful enforcement provisions were necessary in order for the Republican proposal to be taken seriously. To conservative Republicans and their business constituents, private litigation was preferable to public bureaucracy. Thus, conservative Republican support for Title VII was conditioned on a legislative deal that traded private lawsuits for public bureaucracy. As part of the deal, liberals insisted that if private enforcement was the best they could do, a fee shift must be included, and thus Republicans incorporated one into their amendments to Title VII. Civil rights groups regarded the substitution of private lawsuits—even with fee shifting—for strong administrative powers as a bitterly disappointing evisceration of Title VII's enforcement regime.¹⁷

If civil rights liberals and private enforcement regimes were a forced marriage, they soon fell in love and became inseparable. Civil rights groups mobilized in the early 1970s to spread legislative fee shifting across the field of civil rights, first to school desegregation cases in the School Aid Act of 1971, then to voting rights in the Voting Rights Act Amendments of 1975, and then to all other civil rights laws that allowed private enforcement but lacked fee shifting in the Civil Rights Attorney's Fees Awards Act of 1976. Why? The two causes discussed earlier in this paper for declining liberal faith in administrative power were critical: concerns about administrative capture and timidity, greatly exacerbated by Nixon's influence upon the federal bureaucracy. Even under the Johnson administration, civil rights liberals regarded the federal bureaucracy's enforcement of civil rights as feeble, lacking both in political will and in

commitment of resources. When Nixon came to power, open conflict and antagonism broke out between civil rights liberals and the administration across civil rights in employment, education, housing, and voting. Perceptions of the federal bureaucracy as lackluster were replaced by perceptions of the federal bureaucracy as purposefully obstructionist, and at times as the enemy.¹⁸

However, these factors explain civil rights groups turn away from bureaucracy, not their embrace of private lawsuits with fee shifting, an enforcement alternative that, when adopted in 1964, they regarded with profound disappointment. Civil rights groups' embrace of private enforcement regimes, and the widespread adoption of private enforcement regimes as a reform strategy by the liberal coalition that shaped the new social regulation, was further propelled by several other developments. First, as Shep Melnick's contribution to this volume traces, the federal courts during this period took an expansive, pro-plaintiff orientation toward the CRA of 1964, making the judiciary a more hospitable enforcement venue for plaintiffs than anyone expected. Second, private rights of action with fee shifting proved unexpectedly potent in cultivating a private enforcement infrastructure in the American bar. In this regard, the early 1970s was a critical period of policy learning.

Growth of the private enforcement infrastructure

During the first half of the 1970s, attorney's fee awards contributed resources to existing civil rights groups that prosecuted lawsuits under the new civil rights laws, such as the NAACP Legal Defense Fund and the Lawyers' Committee for Civil Rights Under Law, adding to their enforcement capacity.¹⁹ By 1973, the Lawyers' Committee was devoting half of its staff to its job discrimination litigation unit, which had become nearly self-supporting through attorney's fee awards.²⁰ By 1975, \$550,000 of the LDF's operating budget of \$3 million (over 18 percent)

came from attorney's fee awards.²¹ The availability of fee awards also contributed to the formation of significant new civil rights enforcement groups, with foundation seed money, on the expectation that they would be able to draw continuing operating funds from attorney's fees awards.²²

Liberal public interest law groups fashioned on the model of these civil rights organizations grew rapidly in the late 1960 and early 1970s. A 1976 study identified 72 such groups in the U.S., spanning the areas of civil rights and civil liberties, environmental, consumer, employment, education, health care, and housing policy. Of the 72 groups identified, only 7 had been founded prior to 1968. When surveyed in 1975, a major share of these groups' work was litigating in the fields of the new social regulation. In the three years from 1972 to 1975, the revenue brought in by these groups in the form of attorney's fee awards from litigation grew by 239 percent. While attorney's fees were, on average, a small fraction of these groups' revenue, for some it was a primary source of funding to sustain litigation programs.²³

In addition to increasing enforcement resources available to civil rights groups, the private enforcement approach in parts of the CRA of 1964, and numerous civil rights laws to follow that model in the ensuing decade, fostered the growth of a private for-profit bar to litigate civil rights claims. After a slow start in the second half of the 1960s, during which time little private Title VII enforcement materialized, in the first half of the 1970s the number of job discrimination lawsuits multiplied tenfold, growing from an annual number of about 400 to 4000, where it roughly plateaued for the balance of the decade.²⁴ Title VII's fee shifting provision, according to one practitioner in the field, had "led to the development of a highly skilled group of specialist lawyers" to enforce it.²⁵ A 1977 report of the Ford Foundation on civil rights litigation observed that "[u]ntil at least the mid-1960s the NAACP Legal Defense and

Education Fund stood almost alone” as a prosecutor of civil rights suits, but by the mid-1970s “fee-generating private practice has in many areas of the South enabled an indigenous bar, engaged in litigating cases of racial discrimination, to survive.”²⁶ An April 1976 *Washington Post* article titled “Civil Rights Turns to Gold Lode for Southern Lawyers” declared: “The lure of legal fees, paid by the loser, is fertilizing a whole new practice in civil rights disputes.”²⁷

As civil rights leaders pursued the spread of fee shifting and observed the remarkable mushrooming of a for-profit civil rights bar in the first half of the 1970s, they were simultaneously active and important participants in collaborative umbrella organizations that brought together groups from across the liberal public interest movement. In these networks, public interest law groups spanning the waterfront of the new social regulation pooled information, learning from one another’s experiences. The question of how to finance public interest law, and the role of fee awards in that calculus, was a matter of extensive attention and discussion within this network in the early to mid 1970s.²⁸

The Council on Public Interest Law was formed in the spring of 1974. Later succeeded by the Alliance for Justice, the Council was an association of activists in the public interest law movement, including leaders of non-profit public interest organizations spanning civil rights, environmental, consumer, education, public health, good government, and poverty law. Its initial purpose was to develop and disseminate a strategic plan for financing public interest legal representation—a vision for harnessing economic support for the spread and growth of public interest law, with a central focus being the enforcement of rights under the new social regulatory statutes. The Council’s book-length report, titled *Balancing the Scales of Justice: Financing Public Interest Law in America*, articulated a coalition-wide, self-conscious, coordinated

decision of the leaders of the liberal public interest law movement to embrace the strategy of privatizing the enforcement of social regulation.²⁹

As expressed in *Balancing the Scales of Justice*, the strategy was to “bring into the marketplace” cases under the new social regulatory statutes that otherwise would not be prosecuted, making such cases “economically attractive to regular commercial lawyers” in the “commercial legal marketplace.” “[T]he passage of legislation authorizing court awards of attorneys’ fees,” the report advocated, “may make it possible for some matters that would now be considered public interest cases eventually to be handled on a contingent commercial basis.” The report regarded the budding model of what it called “private public interest law firms,” then beginning to develop under recent fee shifting legislation, as a model to build upon and as “a significant area for growth.” Such firms could be “economically viable” in the for-profit arena, could be sustained by fee awards under statutes, and could function as the backbone of the enforcement infrastructure for the new social regulation. In order to “institutionalize” this for-profit private enforcement infrastructure, the liberal public interest movement’s reform strategy would need to focus on securing statutory fee shifting provisions from Congress. The report provided a model fee shifting statute to be pursued legislatively.³⁰

Balancing the Scales of Justice was also explicit that this reform strategy was modeled on what had been learned from the success of the civil rights movement. It noted that the NAACP Legal Defense and Education Fund was a pioneer in recognizing the importance of cultivating a network of private for-profit attorneys to “convert theoretical statutory rights into practical substantive benefits,” and that LDEF “tried to *institutionalize that network by obtaining legislation authorizing attorneys’ fees in order to convert its work from public interest law into a marketplace endeavor in which private lawyers could routinely participate.*” By the time of the

Council’s strategy session in 1974, the report stated that “[v]irtually all public interest law endeavors today follow aspects of this model in one way or another,” a private enforcement model with which “the NAACP/LDEF demonstrated that it is possible for a minority not merely to challenge the constitutionality of individual statutes or policies, but also to build an agenda for change.” Again and again, the report returned to the example of Title VII as a focal point, emphasizing that its fee shift created of a for-profit plaintiffs’ job discrimination bar and thereby demonstrated—in the face of liberals’ initial skepticism—the feasibility of a private enforcement strategy that could be generalized across the waterfront of the new social regulation.³¹

Indeed, progress toward this goal was well underway by the time the Council met in 1974. A 1976 study examined private for-profit firms that devoted at least 25 percent of their practice to “non-commercial” issue areas with the goal of “law reform”—importantly including enforcement of civil rights, environmental, consumer, employment, housing, education, and health care statutes. The study identified 55 such firms in the U.S., and of them only two had been in existence in 1966. In the eight years from 1967 to 1975, the number of such firms increased from 2 to 55. The collection of attorney’s fees from defendants was an important source of revenue to these firms.³² In 1977, Mary Derfner, an expert on fee shifting, observed that during the first half of the 1970s, fee shifting provisions in recent federal statutes cutting across civil rights in employment, education, and voting; environmental protection and public nuisance regulation; and consumer protection in banking and product safety; had conjured into existence a for-profit bar prepared to prosecute such federal statutory claims on behalf of plaintiffs. Because of congressionally provided fee shifting provisions, she explained, litigating such claims contributed to “a financially viable practice,” and consequently “public interest laws firms burgeoned.”³³

The Success of the First Litigation Reform

The long-term success of the pro-litigation reform movement is reflected in Figure 1. It displays the net number of private rights of action with fee shifts and/or damages enhancements (double, triple, or punitive) added to the body of federal statutory law from 1933 to 2004, with a locally weighted least squares curve fit through the data points. The number of these litigation incentives is “net” in that it accounts for exits from federal statutory law due to repeal, expiration by the law’s own terms, or being stricken by the Supreme Court. The predicted number rose sharply from the late 1960s to the late 1970s, somewhat plateaued until the mid-1990s, and then declined after the Republican party took control of Congress in 1995. The solid line in figure 2 represents the cumulative number of private rights of action with plaintiffs’ fee shifts and damages enhancements in effect annually (accounting for exits), reflecting the structural environment of private enforcement regimes in existence annually. The dashed line in figure 2 is the annual rate, per 100,000 population, of private federal statutory enforcement litigation (it is only possible to distinguish privately from governmentally filed actions beginning in 1942). The strikingly close association between these two variables, and particularly the coincident sharp upward shift in both at the end of the 1960s, reinforces the plausibility of plaintiffs’ fee shifts and damages enhancements as measures of the broader phenomena of private enforcement regimes, and of the efficacy of private enforcement regimes in mobilizing private litigants. It deserves emphasis that about 98 percent of these suits were prosecuted by for-profit counsel, and only 2 percent by interest groups.³⁴

The Reagan Years

Deregulation and Administrative Power

Ronald Reagan came to power on the wave of a regulatory reform movement. It was, of course, quite different from the one that emerged in the late 1960s and early 1970s—and in some sense a reaction to it. Whereas “fairness,” “justice,” and “equality” were central themes of the movement behind new social regulation, in the late 1970s and early 1980s the themes were “freedom,” “efficiency,” and “economic growth.”³⁵ The reforms of the new social regulation period were driven by civil rights, environmental, consumer, labor, and other liberal public interest groups. In the late 1970s and early 1980s, it was business, trade associations, state and local officials, and newly emergent conservative public interest groups that were the primary catalysts behind the movement for reform through deregulation.³⁶

Regulatory reform was high on the Reagan administration policy agenda. However, substantial continuing public support for the aspirational goals of the new social regulation, coupled with lack of cooperation from Congress, effectively ruled out the possibility of retrenching the new social regulation via legislative amendment.³⁷ Instead, the administration pursued an alternative strategy of deregulation, within the confines of existing statutory mandates, through a combination of withdrawal and redirection of the machinery of administrative implementation. This strategy involved appointing leadership to the new social regulatory agencies that shared the administration’s deregulatory preferences, and that exercised administrative discretion to steer the bureaucracy and regulatory policy in the direction desired by the president. Under Reagan-appointed leadership, the new social regulatory agencies—in such field as civil rights, environmental, consumer, and public health and safety—markedly reduced enforcement activity by numerous objective measures, such as the number of inspections, investigations, citations, civil penalties, administrative enforcement orders, and lawsuits prosecuted. They also embraced less interventionist regulatory standards through

rulemaking, rule rescission, and other forms of regulatory policymaking. Further, the administration, acting through the Office of Management and Budget, sharply reduced agency budgets and, correspondingly, personnel.³⁸

Deregulation and the Problem of Private Enforcement Infrastructures

The forgoing deregulatory strategy by the Reagan administration has been much noted and well documented by scholars. What I wish to stress here is how private lawsuits to enforce federal statutes impeded Reagan's deregulatory program. Upon assuming office, leaders of the Reagan bureaucracy well understood that private enforcement of the new social regulation had been growing steeply, and they saw it as a critical obstacle to their regulatory reform agenda.

By the mid to late-1970s, conservative activists and leading business associations had developed considerable antipathy toward the new social regulation and its encroachment on business and governmental prerogative. Business began to claim that lawsuits under the new social regulatory statutes were having a substantial adverse impact upon business interests. Fee shifting provisions that forced business and government to pay the attorney's fees of the plaintiffs' lawyers who prosecuted invasive, disruptive, and costly lawsuits against them, were a particular target of criticism. They also believed that liberal public interest groups used litigation and courts to shape the substantive meaning of the new social regulatory statutes to their liking, thereby making regulatory policy which was injurious to the interests of business and government.³⁹

Conservative activists and business associations mobilized and collaborated in forming a number of conservative public interest law groups to pursue an agenda, in part, of limiting the new social regulation.⁴⁰ Close associates of Reagan, including high ranking members of his California gubernatorial administration that would follow him to the White House, were

instrumental in founding this movement.⁴¹ Indeed, litigation by liberal public interest groups against the Reagan gubernatorial administration, obstructing its pursuit of conservative public policies which Reagan regarded as critical, provoked members of his administration to found the first conservative public interest law group in Sacramento—the Pacific Legal Foundation—which then served as a model for many others.⁴² Reagan himself was openly hostile to liberal public interest lawyers, characterizing them in the early to mid 1970s as “a bunch of ideological ambulance chasers doing their own thing at the expense of the poor who actually need help,”⁴³ and as “working for left-wing special interest groups at the expense of the public.”⁴⁴

Upon assuming office, the Reagan administration was acutely aware that private enforcement of federal regulatory law had surged powerfully since the late 1960s, and that the private enforcement infrastructure presented an important obstacle to its deregulatory agenda. Reagan had appointed numerous leaders and activists from the emergent conservative public interest law movement to important positions in the federal bureaucracy, ranging across Counselor to the President, the White House Office of Policy Development, the Office of Management and Budget, the Equal Employment Opportunity Commission, and the Departments of Interior, Energy, and Justice.⁴⁵ The conservative public interest law movement had been born in opposition to the steep growth in litigation activity undertaken by both the for-profit and nonprofit plaintiffs bar under the new social regulatory statutes. They had watched, from Nixon’s assumption of office in 1969 to Reagan’s in 1981, as the rate of private enforcement lawsuits under federal statutes increased by 352 percent.⁴⁶ Now in power, they sought to retrench private enforcement. In characterizing anti-litigation reform as retrenchment, I follow Sarah Staszak.⁴⁷

According to Michael S. Greve, a conservative legal activist and founder of the Center for Individual Rights, Reagan administration leadership saw private rights of action with

attorney's fee awards as an obstacle to deregulation. Proposals to curtail fee awards under the new social regulatory statutes—along with a constellation of other efforts to reduce sources of funding for liberal public interest groups—were pursued by conservative activists as part of a strategy to “defund the left.”⁴⁸ Greve explains:

When the Reagan Administration took office in 1981, one of the priorities urged upon it was to cut federal funding for liberal and leftist advocacy groups. Well known conservative activists openly advocated a strategy of “defunding the Left.” This was necessary, they argued, for the success of the conservative social and deregulatory agenda. The incoming administration shared this assessment. President Reagan ... sensed that the liberal public interest movement was a primary obstacle to his campaign promises of “regulatory relief.”⁴⁹

Private enforcement litigation was a “primary obstacle” to Reagan's deregulatory agenda because his principle strategy for effectuating the agenda was to demobilize, to a significant measure, the administrative regulatory enforcement apparatus, with little prospect of actually being able to repeal or modify legislative mandates. The deregulatory reform value of withdrawing administrative enforcement is weakened if extensive private enforcement continues, and the strategy will be severely undercut if private enforcement actually expands to fill gaps left by withdrawal of administrative machinery. Important members of the Reagan bureaucracy were in full agreement with Greve's characterization. Based upon archival research, Jefferson Decker finds that some were deeply concerned that the private rights of action coupled with fee shifting in the new social regulatory statutes were producing “a state-sponsored, private governing apparatus” that was *beyond the control of the elected branches*.⁵⁰

Moreover—and this is critical—advocates of retrenching private enforcement recognized that the proliferation of fee shifting provisions in the 1970s had produced a private enforcement infrastructure not just among liberal public interest groups, but, more significantly, among the for-profit American bar. Greve observes that when the Reagan administration sought to curtail fee awards, “a sizeable portion of attorneys’ fees is collected not by public interest groups but by big, for-profit law firms.”⁵¹ This became an important theme and concern among Reagan White House advocates for retrenching private enforcement, articulated repeatedly in support of an administration legislative proposal to cap fee awards (discussed in the next section). Michael Horowitz, Reagan’s general counsel of OMB, played a leading role in developing the fee cap proposal. In a 1983 memo discussing the problem that the proposal sought to address, Horowitz explained: “Not only the ‘public interest’ movement but, *more alarmingly*, the entire legal profession is becoming increasingly dependent on fees generated by an open-ended ‘private Attorney General’ role that is authorized under more than 100 statutes,”⁵² a large portion of which were enacted in the 1970s.

Writing to Director of OMB David Stockman, Horowitz characterized the goal of the fee cap bill as being “designed in part to bar fee awards to entrepreneurial attorneys who now engage in contingency litigation” under federal statutes.⁵³ “A literal industry of public interest law firms as developed,” he continued, “as a result of the legal fee awards with such groups regarding attorney’s fees as a permanent financing mechanism,” and one central to their commercial viability and business model.⁵⁴ When Stockman transmitted a version of the fee cap bill in 1982 for consideration to Speaker of the House Tip O’Neill, he repeated Horowitz’s lamentation that a “literal industry” had developed of plaintiffs’ lawyers dependent on statutory fee awards.⁵⁵ In the same vein, a Justice Department memo to Counselor to the President Edwin Meese, reporting

on the content of the fee cap bill, stated that it was meant to address the problem of the “growing industry of attorneys capitalizing on civil fee awards.”⁵⁶

Reagan administration advocates of retrenching private enforcement were surely right, from the standpoint of a deregulatory agenda, that the statutory enforcement activity of the for-profit bar, mobilized by fee awards, was more alarming than the activity of the non-profit bar. As noted above, about 98 percent of the suits were prosecuted by for-profit counsel. To the extent that the “regulatory relief” sought by Reagan involved, in part, less aggressive and stringent enforcement of existing statutory mandates, and the private enforcement infrastructure posed a problem to presidential control, then the problem was emanating overwhelmingly from the for-profit bar responding to market incentives.

Attacking the Private Enforcement Infrastructure

Starting 1981, the OMB, with Stockman as Director and Horowitz as general counsel, developed a fee cap bill, which focused on suits against federal and state government defendants. They believed that the extensive fee shifting legislation since the Civil Rights Act of 1964 was a critical part of the incentive structure generating excessive litigation, and the goal of the fee cap proposal was to “drive a stake through that incentive structure.”⁵⁷ Initially titled “The Limitation of Legal Fees Awards Act of 1981,” the proposed bill would amend over 100 federal statutes allowing recovery of attorney’s fees in successful suits against government, ranging across suits under consumer, civil rights, environmental, public health and safety, and freedom of information statutes, among many others. The bill went through a number of permutations from 1981 to 1984. Some core attributes of were:

- A fee cap of \$53 per hour for private attorneys representing paying clients (a figure derived from the annual salaries of government lawyers, and one drastically below what courts had been awarding);
- No fee awards for public interest organizations with staff attorneys, legal services organizations receiving federal funds, or for-profit attorneys representing plaintiffs on a *pro bono* basis;
- The \$53 per hour fee award would be reduced by 25 percent of any money judgment;
- The \$53 per hour fee award would be reduced if it was disproportionate to the actual damages suffered by the plaintiff; and
- Fee awards would apply only with respect to issues on which the plaintiff actually prevailed, and which were necessary for resolving the dispute.⁵⁸

While this proposal's restrictions on fee awards were arguably quite extreme as applied to suits against government, the proposal is also noteworthy for the fact that it did not attempt to restrict fees in suits against the private (business) sector. It is clear that some key actors in the Reagan administration behind pushing the private enforcement issue onto the agenda wanted a more expansive retrenchment of the private enforcement infrastructure, including as applied to the private sector.⁵⁹ If the proposal above had passed into law easily, it likely would have been the thin end of the retrenchment wedge. This was not to be.

How and Why Retrenchment Failed

The fee cap bill failed. The story of its failure, traced below, teaches some important lessons about the long-run resilience of the private enforcement infrastructure. To appreciate them, it is useful first to highlight several institutional factors that make retrenchment of rights difficult. An institutionally fragmented American separation of powers system empowers many

actors to block legislative reform, making legislative change difficult on contentious issues.⁶⁰ This is especially true when the legal change sought involves divesting groups of existing rights. In his work on welfare state retrenchment, Paul Pierson observes that rights-retrenching reforms confront serious political hurdles. The legal rights and interests which retrenchers seek to remove often have already given rise to “resources and incentives that influence the formation and activity of social groups ... [and] create ‘spoils’ that provide a strong motivation for beneficiaries to mobilize in favor of programmatic maintenance or expansion.” Pierson also emphasized that the phenomenon of “negativity bias” leads people to be substantially more likely to mobilize to avoid the imposition of losses of existing rights and interests, as compared to securing new ones. It also leads voters to be more likely to punish politicians that have impaired their interests than to reward politicians who have benefited them, and politicians well-recognize this.⁶¹ Thus, retrenchment of rights is difficult because: (1) institutional fragmentation facilitates blocking policy reforms; (2) existing rights often contribute to group capacity to defend them; and (3) “negativity bias” enlivens group mobilization to block rights retrenchment, heightening the electoral threat to retrenching politicians. The durability of the status quo that can arise from these forces is an important part of the explanation offered by Terry Moe, in his contribution to this volume, for the failure of the education reform proposals that he examines.

Political costs of retrenchment

A number of high-ranking members of the Reagan administration regarded the political costs of the move to aggressively retrench private enforcement as much too high. The strongest advocates of the fee cap within the administration did not propose publicly advocating for the bill as a means of deregulation or demobilization of the private governing apparatus. Rather, they sought to publically frame it as a means of: (1) protecting scarce federal and state tax

revenue from middle class lawyers; (2) compensating “private attorneys general” at the same rate as actual government lawyers rather than big law firm lawyers; and (3) protecting state and local autonomy from overzealous private enforcement of federal mandates against states.⁶² These themes linked fiscal responsibility and federalism, which were two broad aspects of the administration’s core identity.

However, important administration leaders were extremely doubtful that the terms of the debate could be controlled in this way. Instead, they foresaw opponents successfully turning the battle into one over the preservation of substantive rights protected by the statutes to be amended—rights to be free of racial and gender discrimination, to be shielded from predatory business practices, to drink clean water and breathe clean air, to an education for disabled children, to disability benefits for injured workers. That is, they knew that the administration would be attacked by liberal public interest groups and the plaintiffs’ bar for seeking to take popular rights away from vulnerable groups.

Attorney General William French Smith observed that striking too severely at attorney’s fee awards risked “excessive controversy.” He emphasized that in the public relations battle the Administration would be cast as “anti” rights. “Attorney’s fee cap proposals,” Smith wrote, “are thought by public interest litigating organizations to strike at a vital source of their financial support. Accordingly, these groups have characterized fee cap proposals as ‘anti-civil rights’ or ‘anti-environmental’ proposals.”⁶³ Opponents of the proposal would be able to beat it back with “the rhetoric of rights and justice,” as one supporter put it.⁶⁴ Smith also observed that the timing of the bill seemed particularly bad with an election on the horizon.⁶⁵ When the bill was sent to the president’s staff to be cleared in December 1983, Counsel to the President Fred Fielding

echoed Attorney General Smith's skepticism as to both the bill's political risks and its questionable timing:

The circumstances in which attorneys fees are awarded to parties prevailing against the government ... typically involved civil rights litigation, welfare entitlement suits, environmental litigation, and the like. Since the "fee cap bill" would have its greatest impact in these areas, I remain deeply concerned that it will be viewed and portrayed as yet another Administration effort to limit the delivery of legal services to minorities, the poor, and the aged. ... I am not convinced that this is the time to open another front in the ongoing battle over our record in these areas.⁶⁶

Lack of Moderate Republican Support in Congress

In light of this political calculus, it is not surprising that the fee capping bill was ultimately unable to attract the support of moderates in Congress, even among Republicans. As the administration surveyed the bill's legislative prospects, Democratic control of the House caused many to seriously doubt that the bill could pass that chamber. But the problem was not only Democrats. Administration officials assessing the bill's prospects also recognized that it would require the support of liberal Republicans and conservative Democrats, and expressed little optimism that the bill could even pass the Republican-controlled Senate.⁶⁷ Some conservative Republicans recognized, with disappointment, that support within Congress for civil rights, environmental, and consumer groups was very broad, including many moderate Republicans, either because of their sincere preferences or because they feared being cast as an enemy of rights that enjoyed broad public support.⁶⁸ Ultimately, the views of William French Smith and Fred Fielding seemed to be shared by more liberal-leaning Republicans in Congress—even if they

had any inclination to join the administration's attack on the private enforcement infrastructure, the political calculus was against it.

One-sided interest group mobilization

The administration appears to have significantly underestimated the degree of opposition that it would face, and overestimated the degree of support it would enjoy. Prior to announcing the bill, the administration initiated contacts with “interested groups,” which it deemed to be State attorneys general, municipal law enforcement officers, mayors, business, and liberal public interest organizations. The administration, of course, naturally anticipated strong opposition from liberal public interest organizations, and also from the for-profit plaintiffs’ bar, both of whom stood to lose if the fee cap bill succeeded.⁶⁹ As discussed above, the threat or reality of such opposition weakened support for the fee cap bill within the Republican party. However, the administration anticipated support from states and business. As it turned out, both were internally divided.

With respect to state officials—attorneys general, municipal law enforcement officers, and mayors—the administration anticipated support because the bill would preserve state and city tax resources against fee awards, and reduce incentives for private federal lawsuits against cities and states.⁷⁰ However, of these groups only the National Association of State Attorneys General (NASAG) promised support; the National Institute of Municipal Law Officers (NIMLO) declined to take a public position; and United States Conference of Mayors (USCM) would at best be silent, but threatened possible public opposition. Representatives of NIMO explained that they actually regarded fee awards as being of marginal significance relative to overall liability, and that they would take no position on the legislation. They did not explain why, even if liability was larger than fees, they would not still support capping fees, which would reduce

incentives for lawsuits and liability exposure at least somewhat.⁷¹ The position of the USCM provides possible illumination of their motivation.

A representative of the USCM explained to administration officials that most members of the Conference (which represents larger cities) “would react negatively” to the bill and would oppose it. Despite the frequency of lawsuits against cities, he explained, “the mayors themselves were more likely to be sympathetic to the interests of the plaintiffs.” The representative indicated that any policy that would reduce incentives for enforcement of civil rights and environmental legislation, in particular, would be especially likely to provoke opposition given the broad popularity of such policies. The calculus for position-taking by mayors was not so straightforward as simply supporting the bill because cities are the targets of lawsuits and fee awards. Rather, the calculus also included weighing the popularity of the new social regulation among the constituents of big city mayors, not to mention their potential sincere support for the laws. The USCM representative also indicated that the issue of attorneys’ fees had arisen in the past and proven “so controversial that it has not been able to come to the floor of the Conference.” He advised that if the Conference managed to muster any public position on the administration’s fee cap bill it would be negative. Thus, of the three state groups consulted, NASAG would support the administration, NIMLO would take no position for or against, and USCM might publicly oppose.⁷²

To the administration’s surprise, business was divided as well, though for different reasons. The administration anticipated that business interests would be served by reducing fee awards to plaintiffs’ counsel litigating against governments under federal statutes, since such litigation includes challenges by liberal groups to administrative regulatory policymaking calculated to move regulatory law in a liberal direction. Reducing the influence of liberal public

interest organizations on federal and state policymaking, the administration thought, would capture business support for the fee cap bill. Further, as already suggested, a victory for the fee cap bill as applied to litigation against government could be the thin end of a wedge, opening the possibility of retrenching private enforcement as applied to the private sector. After the administration gauged the preferences of business leaders, it concluded that big business could be counted upon for support. Small business, however, looked like a big problem. A strategy memo in the Office of Legal Policy suggested, with disappointment, that the bill threatened to provoke the “wrath of the small business community.”⁷³

The reason was that, ironically, small business had themselves developed an interest in preserving fee awards under the Equal Access to Justice Act, and that interest was threatened by the administration’s bill. With Republicans and business as legislative catalysts, in 1980 Congress had enacted the Equal Access to Justice Act, which provided for attorney’s fee awards for small businesses, individuals, and organizations that prevail against the federal government in administrative or judicial proceedings in which they challenge the legitimacy of federal regulatory actions. The law, passed as part of a small business assistance statute, was primarily intended to aid small businesses in challenging excessive and unreasonable regulation by the federal government, including prosecutions of small businesses accused of violating regulatory laws. In the absence of fee shifting, it was argued, small businesses often had limited capacity or incentive to resist the abuse of federal regulatory power. The fee shift would help to level the playing field and curb excessive and unreasonable regulation.⁷⁴ When the Regan administration’s fee cap bill became public, small business groups made clear that they would not give up their new weapon quietly, and that any effort to take it away would be regarded as

“break[ing] faith with the small-business community,” as one business association leader declared in an interview published in the *Wall Street Journal*.⁷⁵

The initial version of Reagan’s fee cap bill failed to find a congressional sponsor even within the president’s own party. The administration then developed a moderated version of the bill, and in 1984 hearings were held on this bill in a Senate subcommittee chaired by Orrin Hatch (R, UT), who championed the bill as a much needed corrective to the proliferation of statutory fee shifting rules in the 1970s, creating “exorbitant windfalls for lawyers,” leading to an “explosion of litigation” which had “clogged the courts.”⁷⁶ However, despite Hatch’s alignment with legal conservatives in the administration that sought to retrench the private enforcement infrastructure, he was unable to muster support in his own Republican-controlled committee, where the bill died.

Lessons

The Reagan Administration’s fee cap bill was among the most aggressive attacks on the private enforcement infrastructure in federal regulation ever undertaken. Its failure suggests three important lessons about the resilience of private enforcement. First, as a matter of political framing, it was extremely difficult for advocates of retrenching private enforcement to separate the legal structures of private enforcement (like fee shifts) from the substantive rights to which they were attached. Their attempt to retrench enforcement provisions evoked a political response little different than if they were seeking to repeal substantive rights. This rights focus of the debate caused divisions within the Reagan White House and the Republican party, such that the bill had only weak support in some important quarters of the administration and got no traction even in the Republican-controlled Senate. It also significantly weakened the administration’s

ability to command the support of groups representing state interests—interests that the administration claimed to be championing.

Second, over the course of time the interests tied to private enforcement deepened and widened, making private enforcement more difficult to uproot. The interests of liberal law reform organizations grew in retaining access to fee awards themselves, and, even more, in protecting the lifeblood (attorney's fees) of the private enforcement infrastructure that they had so assiduously cultivated. Moreover, the private for-profit bar thereby cultivated surely sought to protect its own interests, and added heft and capacity to the coalition defending the private enforcement status quo when the anti-litigation reform movement emerged in the early Reagan years.

The interests tied to private enforcement spread even to some quarters of business, typically regarded as opponents of private enforcement. There is some irony in conservative Republicans imposing—over the objections of liberals—Title VII's private enforcement regime, which in turn became the liberal model for privatizing enforcement of the new social regulation. The irony was compounded when conservative Republicans pressed for small business to participate in the bounty of private enforcement through the Equal Access to Justice Act, thereby helping to cement the whole system into place by extending its benefits into the Republican base. The EAJA was neither the first nor the last time that Republicans drew on the private enforcement model. The Republican participation in spreading private enforcement to benefit its own constituencies represented a broader trend.⁷⁷

Third, the autopilot and durable character of the private enforcement infrastructure had real consequences for presidential power, restricting the president's ability to curtail enforcement. A deregulatory administration could not control a critical source of regulatory

enforcement. To the contrary, during the period that the Reagan administration was considering strategies to reduce private enforcement of federal statutes, such enforcement actually grew by leaps and bounds. After having been roughly flat during the Carter presidency (it declined slightly), during Reagan's first term the rate of private lawsuits enforcing federal statutes *shot up by 63 percent*.⁷⁸ The significance of this growth as an obstacle to Reagan's deregulatory strategy is reinforced by considering specific policy areas within the ambit of his deregulatory agenda. The number of private statutory suits grew by 64 percent under labor statutes, 68 percent under civil rights statutes, 82 percent under environmental statutes, and 90 percent under securities and exchange statutes.⁷⁹ During the Reagan years the targets of federal regulation were more likely than ever to be hauled into court as defendants, overwhelmingly by for-profit plaintiffs' counsel.

Conclusion

The litigation reform strategy developed by the liberal coalition in the late 1960s and early 1970s, in the sphere of federal regulation, sought litigation to perform functions that it concluded the administrative state either could not or would not perform. The movement was largely successful, and its success had a profound and enduring influence on American government. Its model of regulatory implementation had particular appeal in the era characterized by Democratic Congresses facing Republican presidents, combined with growing party polarization. This is not to say that its appeal was limited to this configuration of partisan control of government, for its trajectory was upward nearly continuously from the late 1960s through 2004 (when my data ends).

The period examined in this paper teaches that current debates over "litigation reform" in federal regulation should be understood largely as struggles over the proper scope and reach of the state in the economy and society, much like decisions about whether to create, fund, staff,

and empower bureaucracy. The liberal coalition in the late 1960s and early 1970s regarded private lawsuits as an alternative to bureaucratic inadequacy, and this was one prong of their broader regulatory reform agenda. Those who sought to retrench the private enforcement infrastructure in the early 1980s did so as part of a broader deregulatory program that included diminishing the position of the federal bureaucracy in the American economy and society. They recognized that deregulation within existing regulatory mandates would need to entail demobilization of not just public but also private enforcement. Viewing these two reform movements together highlights that struggles over litigation reform are struggles over American governance.

Advocates of legislatively retrenching private enforcement in federal regulation have seldom succeeded,⁸⁰ and their successes have generally been quickly submerged by the relentless growth of private enforcement. Indeed, calls for anti-litigation reform have been perennial for three decades—from the Limitation of Legal Fees Awards Act of 1981 to the Lawsuit Abuse Reduction Act of 2011. Calls for reform become perennial when they are perennially thwarted. The Reagan administration’s fee cap bill, which would have amended over 100 federal statutes in one enactment, was among the most assertive moves to legislatively retrench private enforcement ever attempted. Subsequent generations of anti-litigation reform proposals in federal regulation generally have been narrower in scope, training their sights on particular statutes and policy areas, as contrasted with mounting cross-cutting attacks on private enforcement in general.

The failure of the fee cap bill contains lessons that help to explain the resilience of the American state’s private enforcement infrastructure in the years since. Retrenching rights is hard in an institutionally fragmented environment. In public debates it is difficult to separate private

enforcement regimes from underlying popular rights, which will discourage risk-averse politicians and interest groups from supporting retrenchment. Negativity bias will amplify opposition and its political efficacy. As private enforcement regimes have diffused across the American regulatory state, the interests formed around them have become more widely spread and deeply rooted, increasing the political capacity of the coalition to defend the private enforcement infrastructure from retrenchment.

The failure of legislative retrenchment of the private enforcement infrastructure is highlighted by the fact that even during periods of significant Republican legislative power, while calls for retrenchment were emanating from some quarters of the Republican party, there was net growth in the private enforcement infrastructure. Republican instigation of the private enforcement regimes in Title VII and the Equal Access to Justice Act were not anomalous. Indeed, while controlling the Senate and the presidency from 1981 to 1986, during which time the fee cap proposal failed, Congress passed and the president signed, per Congress, an average of 12 new private rights of action with fee shifts and/or monetary damages enhancements (figure 1). That number was down materially from the Carter years, when 21 per Congress were passed, but it contributed to the continuing growth of opportunities and incentives for private lawsuits enforcing federal law. This basic pattern persisted from 1987 to 2004: Democratic Congresses from 1987 to 1994 passed 20 per Congress, and Republican Congresses from 1995 to 2004—while proclaiming an anti-litigation reform agenda—passed 11 per Congress (figure 1). Under Republican Congresses, the rate of growth slowed, but material expansion of the private enforcement infrastructure continued ineluctably (figure 2).

This chapter has focused narrowly on the two decades spanning passage of the Civil Rights Act of 1964 and the end of Reagan's first term, and on pro- and anti-litigation reform

movements as they pursued legislative reform in the field of federal regulation. This narrow temporal frame and substantive focus has neglected much that is important to understanding litigation reform and efforts to retrench private enforcement. Some have argued that beginning in the mid 1980s federal courts, particularly the Rehnquist court, have in fact accomplished material retrenchment of private enforcement incrementally through what Sarah Staszak calls “judicial retrenchment.”⁸¹ They have done so with decisions, for example, placing limitations on attorney’s fee and damages awards; enforcing contractual mandatory arbitration agreements; expansively developing the qualified immunity defense; and influencing and interpreting the federal rules of civil procedure so as to limit access to courts. It seems plausible that such decisions may have limited the pace of growth of private enforcement; had important effects in particular policy areas that are obscured by looking only at net filings; and affected some plaintiffs’ ability to secure counsel, prevail on the merits, or secure the relief sought. The “regime politics” literature teaches that relatively politically and electorally insulated federal courts, operating under simple majority rule, and on a lower visibility terrain, are sometimes able to accomplish partisan goals that cannot be realized in the elected branches.⁸² This analysis appear quite apt with respect to anti-litigation reform, where much of what conservative federal judges have accomplished was first tried and failed as Republican legislative reform, exemplified by the story of the Reagan fee cap bill. The forces that constrain legislative retrenchment of rights have far less purchase in courts.

Still, it is clear that the core aspiration of anti-litigation reformers in the field of federal regulation has been to reduce the role of private litigation in public policy implementation. Despite the anti-litigation posture of an increasingly conservative federal bench beginning in the mid 1980s and continuing to the present, and calls for retrenchment of private enforcement from

congressional majorities from 1995 to 2005, Congress's production of opportunities and incentives for private lawsuits enforcing federal statutes, and correspondingly the rate of such lawsuits, continued to grow into the early 20th century (figure 2). By this metric, the day of anti-litigation reform has yet to arrive.

Figure 1

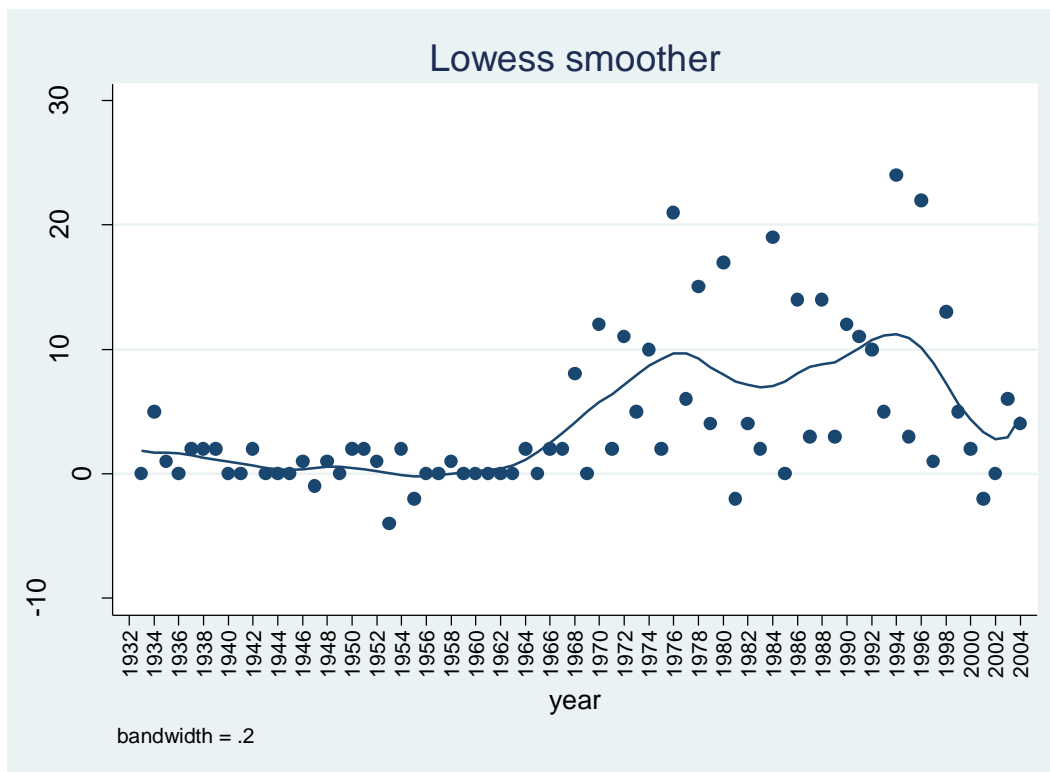
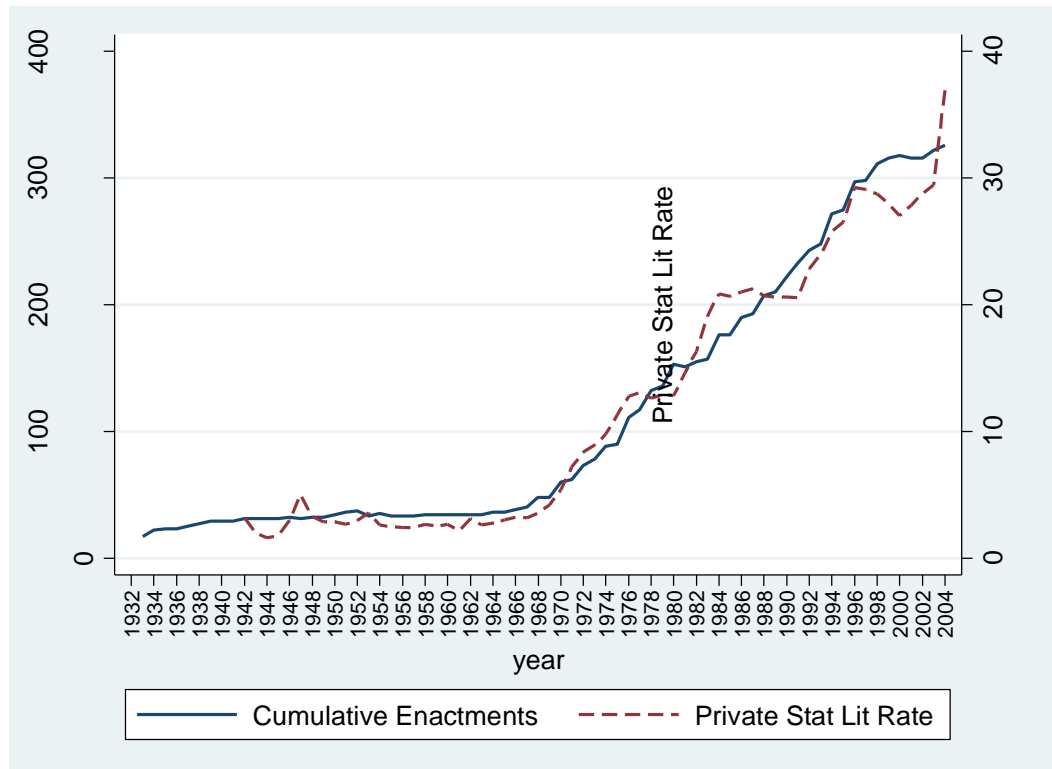


Figure 2



¹ James Q. Wilson, "The Bureaucracy Problem," *The Public Interest* 6 (1967): 3-9, 3.

² *Id.* at 3.

³ David Vogel, "The 'New' Social Regulation in Historical and Comparative Perspective," in *Regulation in Perspective*, ed. Thomas K. McCraw (Cambridge: Harvard University Press, 1981), 155-85, 164-75; Martin Shapiro, *Who Guards the Guardians? Judicial Control of Administration* (Athens: University of Georgia Press, 1988), 55-77.

⁴ Martin Shefter, *Political Parties and the State: The American Historical Experience* (Princeton: Princeton University Press, 1994), 86-94; Jules Witcover, *Party of the People: A History of the Democrats* (New York: Random House, 2003), ch. 27; Vogel, "The 'New' Social Regulation in Historical and Comparative Perspective," 164-75; David Vogel, *Fluctuating Fortunes: The Political Power of Business in America* (New York: Basic Books, 1989); Sean Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the U.S.* (Princeton: Princeton University Press, 2010), 129-213.

⁵ Vogel, *Fluctuating Fortunes*, 293.

⁶ Keith T. Poole and Howard Rosenthal, *Congress: A Political-Economic History of Roll Call Voting* (New York: Oxford University Press, 1997).

⁷ R. Shep Melnick, "Courts and Agencies," in *Policy, Making Law: An Interbranch Perspective*, ed. Mark C. Miller and Jeb Barnes (Washington, DC: Georgetown University Press, 2004), 89-104, 93; Simon Lazarus and Joseph Onek, "The Regulators and the People," *Virginia Law Review* 57 (1971): 1069-1108; Shapiro, *Who Guards the Guardians*, 62-73; Wilson, "The Bureaucracy Problem;" Richard Stewart, "The Reformation of American Administrative Law," *Harvard Law Review* 88 (1975): 1667-1813, 1684-85, 1713-15.

⁸ Gary Jacobson, "Partisan Polarization in Presidential Support: The Electoral Connection," *Congress and the Presidency* 30 (2003): 1-36; Nolan McCarty, Keith T. Poole, and Howard Rosenthal, *Polarized America: The Dance of Ideology and Unequal Riches* (Cambridge: MIT Press, 2006).

⁹ R. Shep Melnick, "From Tax and Spend to Mandate and Sue: Liberalism after the Great Society," in *The Great Society and the High Tide of Liberalism*, ed. Sidney Milkis and Jerome M. Mileur (Amherst: University of Massachusetts Press, 2005), 387-410, 398-99; Farhang, *The Litigation State*, 129-213; Farhang, "Legislative-Executive Conflict and Private Statutory Litigation in the United States: Evidence from Labor, Civil Rights, and Environmental Law," *Law and Social Inquiry* 37 (2012): 657-85; Joel D. Aberbach, *Keeping a Watchful Eye: The*

Politics of Congressional Oversight (Washington, DC: Brookings Institution, 1990), 27; *Hearings on Class Action and Other Consumer Procedures Before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce*, 91st Cong., 2nd sess., 1970.

¹⁰ Melnick, “From Tax and Spend to Mandate and Sue,” 399; Lazarus and Onek, “The Regulators and the People”; Vogel, *Fluctuating Fortunes*, ch. 5; Stewart, “The Reformation of American Administrative Law.”

¹¹ Morris P. Fiorina, “Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?” *Public Choice* 39 (1982): 33-66; Eugene Bardach and Robert A. Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness*, rev. ed. (Philadelphia: Transaction Publishers, 2002), ch. 10; Farhang, *The Litigation State*.

¹² Sean Farhang, “Congressional Mobilization of Private Litigants: Evidence from the Civil Rights Act of 1991,” *Journal of Empirical Legal Studies* 6 (2009): 1-34; Farhang, *The Litigation State*.

¹³ Frances Kahn Zemans, “Fee Shifting and the Implementation of Public Policy,” *Law and Contemporary Problems* 47 (1984): 187-210; Farhang, *The Litigation State*; Kagan, *Adversarial Legalism*.

¹⁴ *Hearings on Legal Fees Before the Subcommittee on Representation of Citizen Interests of the Senate Judiciary Committee*, 93rd Cong., 1st sess., 1973; Farhang, *The Litigation State*, ch. 5.

¹⁵ Farhang, *The Litigation State*, 21-31.

¹⁶ Farhang, *The Litigation State*, ch. 4; Daniel Rodriguez and Barry R. Weingast, “The Positive Political Theory of Legislative History,” *University of Pennsylvania Law Review* 151 (2003): 1417-1542; Anthony S. Chen, *The Fifth Freedom: Jobs, Politics, and Civil Rights in the United States, 1941-1972* (Princeton: Princeton University Press, 2009), chap. 5.

¹⁷ *Id.*

¹⁸ Farhang, *The Litigation State*, ch. 5.

¹⁹ Armand Derfner, “Background and Origin of the Civil Rights Attorney’s Fee Awards Act of 1976,” *Urban Law* 37 (2005): 653-61, 656; Karen O’Connor and Lee Epstein, “Bridging the Gap between Congress and the Supreme Court: Interest Groups and the Erosion of the American Rule Governing Award of Attorney’s Fees,” *Western Political Quarterly* 38 (1985): 238-49, 241.

²⁰ *Hearings on Legal Fees Before the Subcommittee on Representation of Citizen Interests of the Senate Judiciary Committee*, 93rd Cong., 1st sess., 1973 (hereinafter *1973 Hearings on Attorney’s Fees*) (testimony of Armand Derfner), 1112-13.

²¹ O’Connor and Epstein, “Bridging the Gap,” 241.

²² Robert B. McKay, *Nine for Equality under Law: Civil Rights Litigation. A Report to the Ford Foundation* (New York: Ford Foundation, 1977); O’Connor and Epstein, “Bridging the Gap,” 240.

²³ Handler, Ginsburg, and Snow, “The Public Interest Law Industry”; Vogel, *Fluctuating Fortunes*, 105.

²⁴ *Federal Court Cases: Integrated Data Base, 1970-2000*, maintained by ICPSR. The method for arriving at the estimates is explained in Farhang, *The Litigation State*, 271 n. 118.

²⁵ *1973 Hearings on Attorney’s Fees*, 1113.

²⁶ McKay, *Nine for Equality*, 8, 13.

²⁷ Bill Crider, “Civil Rights Turns to Gold Lode for Southern Lawyers,” *Washington Post*, April 4, 1976, 59.

²⁸ Louise Trubek, “Public Interest Law: Facing the Problem of Maturity,” *University of Arkansas at Little Rock Law Review* 33 (2011): 417-33, 418-19; Council for Public Interest Law, *Balancing the Scales of Justice: Financing Public Interest Law in America* (Washington D.C.: Council on Public Interest Law, 1976); Burton, *Public Interest Law*.

²⁹ Council on Public Interest Law, *Balancing the Scales of Justice*; Trubek, “Public Interest Law,” 419-23; “New Council for Public Interest Law Is Formed,” *American Bar Association Journal* 61 (June 1975): 769.

³⁰ Council on Public Interest Law, *Balancing the Scales of Justice*, 9-10, 37-38, 89-90, 134-46, 318-20 (emphasis added).

³¹ Council on Public Interest Law, *Balancing the Scales of Justice*, 20-21, 37-38, 54, 89-90, 113-14, 140-46, 313-18.

³² Handler, Ginsburg, and Snow, “The Public Interest Law Industry.”

³³ Derfner, “One Giant Step,” 443-45.

³⁴ For a discussion of the data underling the figures and this paragraph, see Farhang, *The Litigation State*, chaps. 1 & 3.

³⁵ Thomas O. McGarity, “Regulatory Reform in the Reagan Era,” *Maryland Law Review* 45 (1986): 253-273, 253-54.

³⁶ McGarity, “Regulatory Reform in the Reagan Era”; Decker, *Lawyers for Reagan*; O’Conner and Epstein, “Rebalancing the Scales of Justice”; Vogel, *Fluctuating Fortunes*.

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- ³⁷ Vogel, *Fluctuating Fortunes*, 260-65; Greve, "Why 'defunding the Left' Failed," 101-04.
- ³⁸ McGarti, "Regulatory Reform in the Reagan Era"; Vogel, *Fluctuating Fortunes*, 246-51; Robert Litan and William Nordhaus, *Reforming Federal Regulation* (New Haven: Yale University Press, 1983), 119-32; Farhang, *The Litigation State*, ch. 6; Farhang, "Legislative-Executive Conflict and Private Statutory Litigation in the United States."
- ³⁹ Michael S. Greve, "Why 'defunding the Left' Failed," *Public Interest* 89 (1987): 91-106, 91; Jefferson Decker, *Lawyers for Reagan: The Conservative Litigation Movement and American Government, 1971-87*, Ph.D Dissertation, Columbia University, 2009, 12-149; Karen O'Conner and Lee Epstein, "Rebalancing the Scales of Justice: Assessment of Public Interest Law," *Harvard Journal of Law and Public Policy* 7 (1984): 483-505; Steven M. Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton: Princeton University Press, 2009), 60-66.
- ⁴⁰ Id.
- ⁴¹ Decker, *Lawyers for Reagan*, 3-5; O'Conner and Epstein, "Rebalancing the Scales of Justice," 495; Teles, *The Rise of the Conservative Legal Movement*, 60-61.
- ⁴² Ronald A. Zumbun, "Life, Liberty, and Property Rights," in *Bringing Justice to the People: The Story of the Freedom-Based Public Interest Law Movement*, ed. Lee Edwards (Washington, DC: Heritage Books, 2004), p.42-43; Decker, *Lawyers for Reagan*, 3-5; Teles, *The Rise of the Conservative Legal Movement*, 62.
- ⁴³ Greve, "Why 'defunding the Left' Failed," 91; Ronald Ostrow, "Legal Services Agency Battles Reagan Attempt to Cut Off Its Funding," *Los Angeles Times*, April 12, 1981, B1.
- ⁴⁴ Decker, *Lawyers for Reagan*, 74.
- ⁴⁵ Decker, *Lawyers for Reagan*, 5, 160, 251.
- ⁴⁶ See figure 2.
- ⁴⁷ Sarah Staszak, "Institutions, Rulemaking, and the Politics of Judicial Retrenchment," *Studies in American Political Development* 24 (2010): 168-89. Staszak examines retrenchment of access to courts and judicial authority, investigating a much wider range of strategies than legislative repeal, which is the focus of this paper.
- ⁴⁸ Michael S. Greve, "Why 'defunding the Left' Failed," *Public Interest* 89 (1987): 91-106.
- ⁴⁹ Greve, "Why 'defunding the Left' Failed," 91.
- ⁵⁰ Decker, *Lawyers for Reagan*, 181.
- ⁵¹ Greve, "Why 'defunding the Left' Failed," 103.
- ⁵² Mike Horowitz to Dick Hauser and Bob Kabel, June 16, 1983, Reagan Library, James W. Cicconi Files, box 23, Department of Justice (folder 1)(emphasis in original).
- ⁵³ Mike Horowitz to David Stockman and Edwin Harper, June 22, 1982, Reagan Library, John G. Roberts, Jr. Files, box 5, Attorney's Fees (folder 1 of 3).
- ⁵⁴ Id.
- ⁵⁵ David Stockman to Thomas P. O'Neill, July 22, 1982, Reagan Library, John G. Roberts, Jr. Files, box 5, Attorney's Fees (folder 1 of 3).
- ⁵⁶ Joseph R. Wright, Jr. to Edwin Meese, III, July 25, 1983, Reagan Library, box 9094, Attorney Fee Reform Legislation.
- ⁵⁷ Decker, *Lawyers for Reagan*, 186.
- ⁵⁸ Horowitz to Stockman and Harper 7/22/1982 (attachments B and C); Robert Percival and Geoffrey Miller, "The Role of Attorney Fee Shifting in Public Interest Litigation," *Law and Contemporary Problems* 47 (1984): 233-47, 242; Fred Barbash, "... And Uncle Sam Wants to Save on His Legal Fees," *Washington Post*, February 10, 1982, A25; Mary Thornton, "Plaintiffs' Legal Fess Attacked by OMB," *Washington Post*, August 12, 1982, A21.
- ⁵⁹ Greve, "Why 'defunding the Left' Failed"; Decker, *Lawyers for Reagan*, 179-88.
- ⁶⁰ E.g., Terry M. Moe, "Political Institutions: The Neglected Side of the Story," *Journal of Law, Economics, and Organization* 6 (1990): 213-53.
- ⁶¹ Paul Pierson, *Dismantling the Welfare State? Reagan, Thatcher, and the Politics of Retrenchment* (Cambridge: Cambridge University Press, 1994), 17-19, 39-46.
- ⁶² Mike Horowitz to Lee Verstandig and Rick Neal, October 19, 1983, Reagan Library, JL007 Case File 20054, Attorneys' Fees Reform Bill.
- ⁶³ Decker, *Lawyers for Reagan*, 184-85.
- ⁶⁴ Greve, "Why 'defunding the Left' Failed," 104.

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- ⁶⁵ William French Smith to Cabinet Council on Legal Policy, June 15, 1983, Reagan Library, James W. Cicconi Files, box 23, Department of Justice (folder 1).
- ⁶⁶ Fred F. Fielding to Richard G. Darman, December 16, 1983, Reagan Library, John G. Roberts, Jr. Files, box 31, Legal Fees Reform Act (folder 2 of 3). For additional expressions of this concern, see Fred F. Fielding to Richard Darman, September 21, 1983, Reagan Library, John G. Roberts, Jr. Files, box 31, Legal Fees Reform Act (folder 1 of 3); Edward C. Schmults to Michael Horowitz, June 1, 1983, Reagan Library, JL007 Case File 20054, Attorneys' Fees Reform Bill.
- ⁶⁷ Edward C. Schmults to Edwin Meese III, October 31, 1983, Reagan Library, James W. Cicconi Files, box 23, Department of Justice (folder 1); Jonathan C. Rose to Edward C. Schmults, October 27, 1983, Reagan Library, James W. Cicconi Files, box 23, Department of Justice (folder 1); Decker, *Lawyers for Reagan*, 184.
- ⁶⁸ Greve, "Why 'defunding the Left' Failed," 101-02.
- ⁶⁹ Rose to Schmults 10/27/83; Smith to Cabinet Council 6/15/83; Barbash, "... And Uncle Sam Wants to Save on His Legal Fees."
- ⁷⁰ Horowitz to Verstandig and Neal 10/19/83; Rose to Schmults 10/27/1983.
- ⁷¹ Rose to Schmults 10/27/83.
- ⁷² Id.
- ⁷³ Horowitz to Hauser and Kabel 6/16/83; Horowitz to Stockman and Harper 6/22/82; Rose to Schmults 10/27/83.
- ⁷⁴ House Report No. 1418, 96th Cong., 2nd Sess., 1980, 12; Senate Report No. 253, 96th Cong., 1st Sess., 1979, 7; Susan Gluck Mezey and Susan Olson, "Fee Shifting and Public Policy: The Equal Access to Justice Act," *Judicature* 77 (1993): 13-20; Gregory C. Sisk, "The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct," *Louisiana Law Review* 55 (1994): 217-360, 220-29, 280 n. 396; Ar Lew S. Ragozin, "The Waiver of Immunity in the Equal Access to Justice Act; Clarifying Opaque Language," *Washington University Law Review* 61 (1986) 217-244, 219-21.
- ⁷⁵ "Small-Business Groups Protest Reagan's Veto Of Bill for Legal Fees," *Wall Street Journal*, November 12, 1984, 3.
- ⁷⁶ *Hearings on The Legal Fee Equity Act (S. 2802) Before the Subcommittee on the Constitution of the Senate Judiciary Committee*, 98th Cong., 2nd sess., 1984, 1-3.
- ⁷⁷ Farhang, *The Litigation State*, 68.
- ⁷⁸ See figure 2.
- ⁷⁹ *Annual Report of the Administrative Office of the United States Courts*, table C-2, 1980-1984.
- ⁸⁰ Examples of rare successes were the Portal-to-Portal Act of 1947, the Securities Litigation Reform Act of 1995, and the Prison Litigation Reform Act of 1996.
- ⁸¹ Staszak, "Institutions, Rulemaking, and the Politics of Judicial Retrenchment"; Andrew Siegel, "The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence," *Texas Law Review* 84 (2006): 1097-1202.
- ⁸² Mitchell Pickerill and Cornell Clayton, "The Rehnquist Court and the Political Dynamics of Federalism," *Perspectives on Politics* 2 (2004): 233-48; Kevin J. McMahon, "Constitutional Vision and Supreme Court Decisions: Reconsidering Roosevelt on Race," *Studies in American Political Development*, 14 (2000): 20-50; Mark Graber, "The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary," *Studies in American Political Development* 7 (1993): 35-73.